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Supreme Court of the United States

October Term, 1943 — No. 418

WILLIAM WADE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION

The petitioner has applied for review by writ of certiorari of a judgment of the Court of Appeals of the State of New York affirming a judgment of the Appellate Division, Second Judicial Department, which affirmed a prior judgment of the County Court, Westchester County, convicting the petitioner of the crime of murder in the first degree and imposing a sentence of life imprisonment.

The petitioner, Wade, was indicted jointly with three others, Joseph Riordan, Charles McGale and Edward J. Kiernan, for the murder of one John Hartye. All four were tried together, the trial commencing on May 26, 1941, and concluding on June 27, 1941. The jury found all four defendants guilty of felony murder, with a recommendation of life imprisonment in the case of the petitioner and the defendant Kiernan, as permitted by section 1045-a of the New York Penal Law. Riordan and McGale were sentenced to death, Wade and Kiernan to life imprisonment.

The defendants Riordan and McGale appealed directly to the Court of Appeals, in accordance with the directions of the State Constitution (Art. 6, section 7) and Code of

Criminal Procedure (section 517). On April 23, 1942, that court unanimously affirmed the judgment of conviction, without opinion (*People* v. *Riordan and McGale,* 288 N. Y. 544). Riordan and McGale have since been executed.

The petitioner Wade and the defendant Kiernan appealed to the Appellate Division (Code of Criminal Procedure, section 517). On November 9, 1942, that court unanimously affirmed both judgments, citing *People* v. *Riordan-McGale,* and writing no opinion otherwise (*People* v. *Wade,* 265 App. Div. 867; *People* v. *Kiernan,* 265 App. Div. 866). Permission to appeal to the Court of Appeals was thereafter granted to both Wade and Kiernan (Code of Criminal Procedure, section 520, subd. 3). Kiernan's appeal has not yet been perfected. On July 20, 1943, the judgment against the petitioner Wade was unanimously affirmed by the Court of Appeals without opinion (*People* v. *Wade,* 291 N. Y. 574).

On both of his appeals in the state courts the petitioner was heard on the record previously printed and filed in the *Riordan-McGale* case. The present application is accompanied by a petition for permission to appeal *in forma pauperis.* The petitioner's affidavit indicates that he has filed a certified copy of the record used on the appeals of Riordan and McGale to the Court of Appeals, which contains the evidence against all four defendants. The references in this brief are to the pages in that record.

The Facts

In the early morning of April 14, 1941, three convicts escaped from Sing Sing Prison in the Village of Ossining, New York. Two of them were the defendants Riordan and McGale; the third was a man named John ("Patch") Waters. In the course of their flight they shot and killed John Hartye, a prison guard, who, though unarmed, courageously attempted to frustrate their design. The

escape had been carefully planned for months in advance, and was effected with the assistance of at least four confederates outside the prison. The petitioner Wade and the defendant Kiernan were two of these outside confederates. The others, identified as Robert Brown and Charles Bergstrom, have never been apprehended.

We will summarize separately the activities of the escaping convicts and of the conspirators outside the prison walls.

The Three Convicts

Riordan and Waters had been committed to Sing Sing Prison in February, 1940, under sentences of 15 to 30 years for second degree robbery (R. 817, 2658). McGale had been in the same prison since 1935, serving a term of 15 years for attempted robbery in the third degree (R. 2232-3). During a previous term in Sing Sing McGale had discovered an opening into a steam tunnel leading from the basement of the hospital building to the tracks of the New York Central Railroad (R. 937). About nine months before the escape, McGale had chipped off a corroded steel plate covering this opening, and then replaced it in such a way that a mere push would remove it (R. 938). He also contrived to fashion a set of four keys for the doors in the hospital basement (R. 931-6). In the jobbing shop he found a length of rope which he concealed in the tunnel (R. 941-2).

With these preparations completed, McGale apparently felt that he needed outside assistance. Waters and Riordan were in a position to obtain such assistance, as will be shown later. McGale was friendless (R. 2216). About six months before the break, Waters and Riordan were taken into McGale's plot (R. 908).

On a Saturday morning, three weeks before the escape, a milk truck drove into the prison yard. Strapped under the rear housing was a package containing three loaded

revolvers and three pairs of handcuffs. McGale removed the package from the truck and delivered it to Waters in the ice house (R. 926-9). They had been watching the truck every Saturday for weeks (R. 928).

On April 12th, McGale and Riordan, each feigning illness, were admitted to the prison hospital (R. 1522, 1565). Waters obtained admission by a similar ruse on the following day (R. 1560). All three were assigned to the same ward, known as "Medical #1" on the third floor (R. 1525, 1560-1, 1572). On the night of April 13th, two guards were on duty in the hospital, John Hartye and Matteo De Simone (R. 1506). Hartye was assigned to the first and third floors, and De Simone to the fourth, the second floor being closed (R. 1507). The guards were unarmed (R. 1597).

At about 2 o'clock in the morning of April 14th, the three men arose and dressed. They heard Hartye put through a routine telephone report and go to another ward up the hall, where they followed him and confronted him with their guns drawn (R. 913-5). Hartye struck Waters with his fists (R. 956). Both Waters and McGale fired, one bullet striking Hartye in the chest and the other in the back (R. 648-9, 916, 956-7). He died within a few minutes (R. 654).

The shots were heard by the other guard, De Simone, who ran downstairs and encountered Riordan (R. 1588-91). David Kaplan, an inmate, also heard the shots, ran out into the hall and was stopped by Waters (R. 1573-4). At the point of guns De Simone and Kaplan were herded to the basement and locked in a boiler room (R. 1576-8, 1591-3). The three convicts then passed through the various doors with the keys made by McGale, fled through the tunnel and descended to the railroad tracks by means of the rope (R. 919). They ran along the tracks to the Ossining railroad station, expecting to find a car to make good their escape (R. 920). At the station plaza they unexpectedly encountered a patrol car manned by two

Ossining policemen. There was a volley of shots (R. 920). Though the fact does not directly appear in this record, one of the police officers was shot and killed. Waters was either shot or committed suicide (R. 2225). McGale and Riordan ran down to the waterfront and forced a fisherman to row them across the Hudson River in the darkness (R. 1796-1800). They became lost in the woods and were captured at about 9 o'clock in the morning (R. 1654-6).

Both Riordan and McGale confessed their parts in the crime (People's Ex. 16, pp. 2526-2576; People's Ex. 27, pp. 2584-2642).

The Four Confederates

The defendant Edward J. Kiernan had been a friend of Waters for many years (R. 1428). Some months before the escape he had visited Waters at Sing Sing, posing as the prisoner's brother (R. 1814, and see People's Exs. 63-65, pp. 2666-9). Waters told Kiernan that he had a way to get out. Kiernan agreed to help him, and particularly promised to provide him with guns (R. 1429-30). To perfect the plan, Kiernan visited Waters four or five times (R. 1457).

The petitioner Wade had known Kiernan for at least 20 years; they had gone to school together and lived in the same neighborhood (R. 1316-7). Wade was also friendly with Waters and Riordan (R. 1317). Some time in February, 1941, Kiernan asked Wade to assist in the escape. Wade agreed to provide an automobile and a machine gun to complete the getaway (R. 1318-20). Robert Brown, a friend of Wade's, and Charles Bergstrom (also known as Charlie Burke), a friend of Kiernan's, joined the plot (R. 1339, 1345). Kiernan obtained a Thompson submachine gun and stored it at first in his own house and later in Bergstrom's (R. 1346-7, 1467-8).

The next step was smuggling the arms into the prison. Kiernan had in his possession three 38-calibre guns (R. 1430-3). Brown obtained three pairs of handcuffs (R. 1434-5). The guns and handcuffs were tied up in a package and kept in the possession of Kiernan (R. 1435-6). It was Waters' idea to get the guns into the prison on the milk truck (R. 1436). Wade, Kiernan, Brown and Bergstrom took turns in trailing the milk truck from Newburgh, to observe where it stopped (R. 1348). On March 22nd Kiernan hid under the loading platform at the milk depot outside Newburgh and when the truck backed up to the platform at about 2 o'clock in the morning fastened the package to the rear axle (R. 1437-8)—to be removed later by McGale in the prison yard, as related above. During the following week Kiernan visited Waters and made certain that the package had been received (R. 1458-9).

The escape was set for 2:30 in the morning of April 14th (R. 1327). On the evening of April 13th Wade stole a Plymouth car at 39th Street and 7th Avenue in New York City (R. 1323). He accomplished this by jimmying the rear window, reaching in and opening the door, and then wiring the ignition with a jumper underneath the dashboard (R. 1331-2). He had previously obtained a pair of stolen license plates, and hidden them in the cellar of his home (R. 1323). After stealing the car Wade drove home and changed the plates (R. 1325). In the meanwhile Brown, who owned an Oldsmobile (R. 1443), drove to Bergstrom's house, obtained the machine gun and ammunition and placed them in the trunk of his car (R. 1462, 1468). The four men met at 34th Street by prearrangement shortly before midnight and started for Ossining (R. 1326, 1342), Wade driving the stolen Plymouth and the other three riding in the Oldsmobile (R. 1350). Arriving in Ossining, the cars were stopped on a hill, the machine gun was transferred to the Plymouth, and Wade and Kiernan drove the car down to the

station and parked it (R. 1350-1). They started back up the hill to rejoin their companions, but a police radio car came along and to avoid scrutiny they stepped into a beer garden to have a drink (R. 1353-4). While there they heard a fusilade of shots (R. 1354). After some hesitation they left the place, walked up the hill and entered another beer place. From there they went to a taxi stand to get a taxicab for White Plains (R. 1466). Just as they were getting into the cab they were taken into custody by Officer Kelly of the Ossining Police (R. 1626). Brown and Bergstrom had disappeared.

Shortly thereafter Officers Knapp and Florian found the stolen Plymouth underneath the ramp leading to the railroad station (R. 1749-50, 1826-7). In the well beneath the back seat were the machine gun, a drum containing 40 cartridges, a cartridge clip and a ramrod (R. 1756, 1828-9). A jumper was found underneath the dashboard (R. 1969-70).

Both Wade and Kiernan confessed. Much of the foregoing summary has been taken from their confessions. There was, however, ample corroborative proof, and the statement at page 2 of the petition that there was no other evidence tending to connect the petitioner with the crime is made in disregard of the record. We invite attention to the following items of evidence apart from the petitioner's confession:

(1) The petitioner admitted, as a witness at the trial, that he had known Waters, Riordan, Kiernan, Brown and Bergstrom before the commission of the crime (R. 1041). He was therefore acquainted with every member of the plot except McGale.

(2) The petitioner said in his confession that he had assisted in trailing the milk truck for the purpose of smuggling the guns and handcuffs into the prison (R. 1347-50). There was independent proof that all three convicts were armed at the time of the escape (R. 1578). A pair of handcuffs was found in Waters' pocket (R.

1745-6). Another pair was found in the steam tunnel shortly after the crime (R. 1602).

(3) The petitioner said in his confession that he stole a Plymouth sedan at 39th Street and Seventh Avenue on the evening of April 13th, by jimmying the rear window and putting a jumper on the ignition; that he had previously arranged for the theft of a pair of license plates, which he attached to the stolen car on the night of the crime; and that he drove the stolen car to Ossining on that night, placed the machine gun in it and parked it at the railroad station (R. 1322-5, 1331, 1350-1). The People furnished the following corroborative proof: Meyer H. Roth testified that his Plymouth sedan disappeared at the time and place mentioned in the confession (R. 1545-6). Arnold Goodman testified that his Pontiac car was stolen in February, 1941, with his license plates numbered 6K-7046 (R. 1841-2). Roth's Plymouth car, bearing Goodman's license plates, was found at the railroad station in Ossining in the early morning of April 14th, with a machine gun in the back seat (R. 1748-51, People's Ex. 69, p. 2673). There was a jumper underneath the dashboard (R. 1969). The photograph of the car in evidence shows the damaged rear window (People's Ex. 38, p. 2650).

(4) Though the petitioner lived in New York City (R. 1315), he was arrested in Ossining shortly after 2:30 A. M. in the morning of April 14th by Police Officer Vincent R. Kelly (R. 1626). Wade admitted on the witness stand that he and Kiernan were about to leave town in a taxicab when they were placed under arrest (R. 1043, 1112-3).

With his confession supplemented by the foregoing evidence, and the numerous admissions made when he took the stand for the purpose of denying the voluntary nature of his confession, the petitioner's guilt was established by clear and convincing proof.

Argument

I

The Petitioner was not deprived of any constitutional right by the admission of his confession in evidence.

The sole point relied on by the petitioner is that his confession was obtained by force and that its use against him at the trial was a denial of due process of law in violation of the Fourteenth Amendment to the federal Constitution. We submit below a summary of the evidence on *both* sides as to the making of the confession:

Wade and Kiernan were arrested at some time between 2 and 3 A. M. on April 14th (R. 1005). They were taken to the police station in Ossining. The petitioner testified that after his pedigree had been taken he was lodged in a cell, and that within 15 minutes he was assaulted by a group of state troopers who knocked him down, picked him up by the hair, beat him and kicked him for five minutes, when they were interrupted by the arrival of the District Attorney (R. 1006-7). Actually the District Attorney did not arrive at Ossining until 7 o'clock (R. 1243). Wade testified further that thereafter he was beaten continuously for more than an hour (R. 1007), that he was then removed to the State Police barracks at Hawthorne, put in a dark room and beaten for "at least several hours" by "at least four or five" men (R. 1009); that every time he was knocked down he was pulled up by the hair (R. 1009); that Inspector Nugent of the State Police punched him all over the face and finally kicked him in the groin so that he fell unconscious (R. 1010); that he was then taken out to a stable, where he was beaten and kicked until evening (R. 1011); that he was then returned to the fingerprint room, where the beating continued (R. 1012); that he was

returned again to the stable and hung up to a beam by a rope around his neck while the police kept punching him in the body and kicking him in the legs (R. 1012-3); that he finally collapsed, and upon regaining consciousness offered to say anything the police wanted (R. 1013-4). The petitioner said further that he was not permitted to sit down (R. 1008), and was denied food or drink for 18 hours (R. 1014).

On cross examination Wade's testimony assumed fantastic proportions. He testified that he was struck 500 or 600 times, kicked 300 or 400 times, knocked down 100 times, pulled up by the hair 100 times, and so on (R. 1021-2). It is incredible that after such an ordeal any man could even retain his wits; yet that evening the petitioner gave a perfectly coherent statement to the District Attorney. In the course of the questioning he made not the slightest complaint of any ill treatment (R. 1031-2); nor did he make any to the police judge before whom he was arraigned that night in Ossining (R. 1033), or to the County Judge before whom he appeared a week later (R. 1100). Wade testified that after hours of continuous beating his picture was taken by photographers (R. 1009-10). If his testimony was true he must have borne the marks of a savage assault. But no effort was made to produce the pictures.

The three principal participants in the beating according to the petitioner, were Inspector Nugent, Major Moniz, an investigator from the District Attorney's office, and a state trooper described as "Sergeant Bill" (R. 1007, 1010, 1012, 1014-6). In fact these were the only persons capable of identification from the testimony. Inspector Nugent took the stand, and not only denied generally that he had mistreated the petitioner (R. 1247), but denied specifically each particular act attributed to him by Wade (R. 1248-51). Nugent testified further that the petitioner was offered food and drink during the day (R. 1265); that the petitioner had to go through the stable to be taken to the

washroom, and thus had an opportunity to learn its location and description (R. 1280); that he was not beaten at all (R. 1292); that his face was unmarked at the time he gave his statement in the evening (R. 1261); and that he spoke in a normal tone, and did not appear either dazed or tired (R. 1274).

Major Moniz testified to the same effect. He did not lay a hand on the petitioner (R. 1190). During one of the periods when the petitioner said he had been struck by Major Moniz (R. 1084-5), the latter was not even present at the barracks (R. 1188-9, 1199). The witness denied that Wade was not permitted to sit down (R. 1211). He was sitting down for over an hour in the major's presence (R. 1212). The witness testified that Wade looked somewhat tired at the time of giving his statement (R. 1233), but appeared all right otherwise (R. 1103, 1232).

Sergeant William A. Hamblin was probably the individual referred to by the petitioner as "Sergeant Bill." Hamblin denied having threatened Wade, as the latter had testified (R. 1974-7). He testified that he had not struck any of the defendants, or seen them struck by anyone else (R. 1977). He saw no bruises on the petitioner's face or body (R. 1988). Hamblin also testified that at about 1 o'clock in the afternoon of April 14th he offered Wade sandwiches and coffee, which were refused; and that later in the day the petitioner had a glass of milk (R. 1964-5).

The People also called Corporal Maxwell of the State Police, who was present at the barracks on April 14th (R. 1851). He likewise denied having maltreated the petitioner in any way (R. 1853). Lieutenant Mead, of the Ossining police, testified that he saw no evidence of bruises on the petitioner's face when he was arraigned in Ossining at about 2:20 A. M. on April 15th (R. 1768-9).

Wade admitted on cross examination that on the day after his confession he wrote to his mother and told her he was "feeling fine" (R. 1087). He attempted to explain this away by saying that even if he was dying he would tell

his mother he was feeling fine (R. 1088). He was then made to admit that some three weeks later, after he had retained a lawyer, he wrote to his mother that he had been beaten (R. 1089).

George H. Gordon, Jr., a court reporter for the past 20 years (R. 703), was the stenographer who took down the petitioner's statement (R. 962). He testified that he saw no marks on Wade's face (R. 970-1). The petitioner did not speak clearly at times, but did not appear dazed (R. 970). He looked tired, but not weak (R. 977). He did not look frightened (R. 988).

Wade was physically examined at the County Jail on May 13th by two physicians. Dr. Abraham Clahr, called as a witness by the petitioner, testified that he found a scar on the petitioner's left wrist 3/8ths of an inch long; a laceration 1⅛ inches in length on the outer surface of the left thigh; a ¼ inch laceration of the lower lip; and a contusion of the right chest in the region of the eighth rib (R. 1141-2). It appeared, however, that the contusion was purely subjective; the petitioner complained of pain in that region and "had no external evidence of any signs indicating he had any injury or pain there" (R. 1142). In every other respect the petitioner was in perfect physical condition (R. 1146-50).

Dr. Henry T. Kelly, for many years Chief of Staff of the White Plains Hospital (R. 1357), was the other examining physician. He was called as a witness by the People. Dr. Kelly testified that there was no contusion of the chest (R. 1331). He found the same three scars described by Dr. Clahr. The scar on the left wrist was white and well healed, and the witness was definitely of the opinion that it was not of recent origin—it might have been there since boyhood (R. 1359, 1364). The scar on the thigh was superficial, but of more recent origin (R. 1360). It could have been sustained within one to four weeks prior to the examination (R. 1364-5). There was no way of estimating the age of the ¼ inch scar on the lip; it could have been there

for months (R. 1360). All the scars were "altogether trivial" (R. 1362).

It appeared also that Wade had been examined on April 15th, the day after his confession, by Dr. Edward J. Davis. Dr. Davis was not called as a witness by the petitioner, though he was subsequently called in behalf of Kiernan (R. 1403) and McGale (R. 2143). But his report on Wade was introduced in evidence (Defts' Ex. F, not printed). It was made to appear during the examination of Dr. Clahr that Dr. Davis had reported finding a "few ecclymatic arvis on the trunk and face" (R. 1145). The nature and extent of these injuries was not explained in any further detail. Dr. Davis had reported finding Wade's "general appearance and physical condition good," and nothing else wrong with the man (R. 1146-7, 1150).

Wade's sister, Mrs. Marion Emmet, testified that she visited the petitioner at the County Jail about three and a half weeks after he was locked up (R. 994). This would be about May 10th. The witness said the petitioner then had a black eye, a swollen ear, and green marks all over his body (R. 994-5). Dr. Clahr and Dr. Kelly made their examination only three days later and found nothing of the kind (R. 1362). Incidentally Mrs. Emmet was present in the office of Wade's trial counsel, Mr. Lowenberg, when certain other prospective witnesses were there (R. 995-6). It was subsequently established by the testimony of one William J. Kelly that efforts were being made to provide Wade with a false alibi (R. 2086, 2088, 2091). A reading of Kelly's testimony would be enlightening to the Court.

It was conceded by the People that there had been considerable feeling against the defendants in Ossining on the day of the murder. Not only Mr. Hartye, but an Ossining police officer had been brutally killed. Riordan and McGale were attacked and knocked down in the Ossining police station in the presence of numerous witnesses, including newspaper photographers (see Defts' Exs. A-D, pp. 2676-9). Wade testified that he was also assaulted in

the Ossining police station, which may well account for the few bruises which Dr. Davis said he found on the man. Counsel for McGale conceded in summation that "there was a great deal of hysteria in Ossining on the morning of April 14th" (R. 2321). So hostile was the atmosphere that the removal of the defendants to the State Police Barracks at Hawthorne was a prudent measure which served to protect the defendants themselves.

The foregoing is substantially all the testimony with respect to Wade's confession. We think it is quite apparent that whether it was voluntarily made was a question of fact for the jury. The admissibility of confessions is regulated in New York by section 395 of the Code of Criminal Procedure, which reads as follows:

> "*Confession of defendant, when evidence, and its effect.*
>
> A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

It is well settled in New York that where an issue of fact develops at the trial as to whether or not a confession was voluntarily made, the question is one for the jury.

People v. *Doran*, 246 N. Y. 409, 416.

In the present case the petitioner's confession was left to the jury under careful and complete instructions (R. 2436-40), to which no exceptions were taken. Necessarily the jury must have resolved the issue of fact against the petitioner.

This Court passed on a very similar state of facts in *Lisenba* v. *California*, 314 U. S. 219, where the defendant was convicted of the murder of his wife. It appeared that he had been arrested on the morning of Sunday, April 19, 1936, and held in custody all day; that he was then taken to his home and questioned throughout the night; that on Monday he was taken from place to place, taken home again in the afternoon, and questioned until 3 A. M. on Tuesday morning, when he either fainted or fell asleep; that later in the morning, having as yet made no confession, he was arraigned and released on bail; that during this two-day period he claimed to have been beaten severely, and that the prosecution witnesses denied the beatings but admitted persistent questioning; that he was rearrested on the morning of May 2nd, held in custody all day, and (as he contended) threatened with violence; and that he finally confessed that evening. He claimed, as does the present petitioner, a denial of due process of law. But this court said (p. 238):

> "There are cases, such as this one, where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although demand of due process was not an issue in the trial, an issue has been resolved by court and jury, which involves an answer to the due process question. In such a case, we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process."

In various other cases this Court has reiterated the rule that its power to reverse convictions of the state courts is limited to the enforcement of those "fundamental principles of liberty and justice which lie at the base of our civil and political institutions," and "which are secured by the Fourteenth Amendment."

Herbert v. *Louisiana,* 272 U. S. 312, 316;
McNabb v. *United States,* 87 L. Ed., 579, 584;
Buchalter v. *New York,* 87 L. Ed., 1088, 1089.

It is apparent, moreover, from what was said in the *Lisenba* case, *supra,* that where a jury has determined that these "fundamental principles of liberty and justice" have not been violated, its verdict will be accepted by the Supreme Court unless it is without support in the evidence. Here we feel confident that there was ample evidence to support the verdict. It will be noted that the petitioner's claim of impropriety in obtaining the confession is three-fold:

(1) It is asserted that the confession was obtained by the use of physical force. But this was strenuously denied by the People's witnesses, and was not supported by the medical proof. A question of fact was presented, upon which the jury's verdict is conclusive.

Lisenba v. *California, supra;*
Ward v. *Texas,* 316 U. S. 547.

(2) It is said that the petitioner was removed from Ossining to the State Police Barracks at Hawthorne for the purpose of obtaining a confession. But the People contended, on the contrary, that the petitioner and his associates were taken to Hawthorne for the legitimate reason that public hostility in Ossining was so great as to endanger their safety. Both Ossining and Hawthorne are within Westchester County. It was for the jury to determine whether the prosecution's purpose in removing the defendants to the latter place was proper or otherwise.

(3) It is claimed that the petitioner was improperly detained because he was not arraigned until after midnight. But for this there were two legitimate reasons. One was the state of public feeling mentioned above. The other was the necessity for prompt investigation. Here

was a cleverly-planned conspiracy covering a period of many months and involving at least seven desperate criminals. Two were still at large. Immediate questioning of those already in custody was the only feasible means of uncovering their missing confederates. A reading of the confessions will show that persistent interrogation of the defendants was necessary before Brown and Bergstrom could be identified. The fact that the People called more than 40 witnesses at the trial is an indication of the large field that had to be covered in the process of preparation. The New York statute does not require that a defendant be arraigned immediately upon his arrest; it provides only for arraignment "without unnecessary delay" (Code of Criminal Procedure, Section 165). Interrogation of a defendant before arraignment is not forbidden by law. Under all the circumstances the fact that all four defendants were arraigned in less than 24 hours after the capture of the first two was a reasonably prompt compliance with the command of the statute.

The petitioner cannot claim before this Court that the state statute violates the federal Constitution in failing to provide for immediate arraignment. The Fourteenth Amendment "does not draw to itself the provisions of state constitutions and state laws."

Buchalter v. *New York,* 87 L. Ed., 1088.

The petitioner relies on three cases, but principally upon *Ward* v. *Texas,* 316 U. S. 547. There it was undisputed that the petitioner, an ignorant negro, was arrested on a Tuesday night in one county by the sheriff of another; that the arrest was made without a warrant in violation of state law; that he was taken from place to place in six different counties, jailed in one place after another, and questioned continuously until Thursday, when he confessed to another sheriff at a place 110 miles distant from the town where he lived and had been arrested. The petitioner testified also that he had been beaten and burned

by the sheriff and other officers, which the latter denied. The Court held that "the question of physical mistreatment was conclusively resolved by the jury's verdict" (p. 552). It was held, however, that on the admitted facts—namely, the illegality of the arrest, the transportation of the accused to many different places and to great distances, and the length of time he had been held in custody—the due process clause had been violated.

The present case is clearly distinguishable. Here there was no illegal arrest and no illegal delay in arraignment. It appears from the opinion in the *Ward* case that the Texas Code of Criminal Procedure requires an *immediate* arraignment where an arrest is made without a warrant; whereas the New York Code merely requires arraignment "without unnecessary delay." Here the petitioner was simply removed from the place of his arrest to the State Police barracks within the same county, and for an excellent reason; while in the *Ward* case he was transported to numerous places at great distances, apparently for no reason except to prevent the institution of a habeas corpus proceeding. Here the petitioner was arraigned less than 24 hours after his arrest, which occurred in the middle of the night; while in the *Ward* case he was held for at least two days. Thus the factors which induced the Court's decision in the *Ward* case are absent here.

White v. *Texas,* 310 U. S. 530, the second case cited by the petitioner, is even less comparable to the present case. There the petitioner, an illiterate negro farm hand, had been convicted of rape and sentenced to death. It appeared that he was arrested on the day after the crime and held in the county jail for 6 or 7 days. He testified that on many successive nights he had been taken from the jail into the woods by armed Texas Rangers, and there questioned and beaten. The officers denied the beatings, but did not deny the repeated nightly interrogations in the woods. One Ranger admitted taking the petitioner from the jail on numerous occasions, and taking him off the road. There was apparently no explanation for tak-

ing the man out of the jail at all. It was held that a conviction based on a confession obtained in this manner violated the Fourteenth Amendment. But in the length of the petitioner's detention, the number of interrogations, and the locality where the questioning was conducted, the case differs fundamentally from the present one.

Brown v. *Mississippi*, 297 U. S. 278, the last case relied on by the petitioner, is wholly unlike the present case in this vital respect—that the prosecution witnesses *admitted* that the confessions had been obtained by force. The petitioners were negroes convicted of murder. They testified that they had been brutally beaten by mobs of white men, headed by a deputy sheriff, until they confessed. The deputy sheriff and two others who had participated took the stand and admitted the beatings. No one denied this testimony and the Court therefore held, on *undisputed* proof, that the petitioners had been denied due process of law. The distinction between that case and the present one needs no comment.

In this case the jury was called up to decide in effect, whether the petitioner and his co-defendants were unfairly treated. The verdict of guilty was the jury's answer. The Appellate Division reviewed the facts on the appeals of Wade and Kiernan. The Court of Appeals did likewise on the appeals of Riordan and McGale. Both courts were unanimous in affirming. To ask for a further review here is to ask that this Court speculate, upon disputed evidence, that perhaps the jury and the appellate courts of the state were wrong in their unanimous conclusions. We quote the following from *Buchalter* v. *New York, supra*:

> "* * * it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."

See also:

Adams v. *U. S. ex rel. McCann*, 317 U. S. 269, 281.

II

The prayer for a writ of certiorari should be denied.

Respectfully submitted,

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Encl